IN THE HIGH COURT OF AUSTRALIA

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INGLIS AND ANOTHER

V.

COMMONWEALTH TRADING BANK OF AUSTRALIA

ORIGINAL

REASONS FOR JUDGMENT

Oral *Judgment delivered at* SYDNEY

on 30th NOVEMBER 1972 THURSDAY

INGLIS AND ANOTHER

v.

COMMONWEALTH TRADING BANK OF AUSTRALIA

JUDGMENT
(ORAL)

MASON J.

As amended
per letter from
Associate to Plaintiffs
of 9/4/73

INGLIS AND ANOTHER

v.

COMMONWEALTH TRADING BANK OF AUSTRALIA

I have before me in these matters two summonses which have been issued by the plaintiffs. The first summons seeks an adjournment of the hearing of the action which was fixed for yesterday, Wednesday, 28th November, to a date unspecified in the summons. The second summons seeks an order that further and better answers be required from the defendant on interrogatories delivered to it by the plaintiffs. I propose to deal first with the application for an adjournment of the hearing.

In considering that application, I should state briefly the nature of the action. By their statement of claim, the plaintiffs seek relief against the defendant bank in respect of breach of contract, fraud and conspiracy. They also seek relief against the defendant in respect of alleged defamation, an order for the taking of accounts on the basis of wilful neglect and default, and damages for breach of statutory duty.

The issues in the action are complex and multifarious. The statement of claim runs to some forty-two pages. The statement of defence is only slightly shorter in length.

The parties came to issue on the pleadings in December 1971. The action was not set down for trial by the plaintiffs. It was entered for trial by the defendant on 31st August 1972 and set down for hearing in the November sittings

of the Court. In the call-over list at the beginning of this month it was fixed by the Chief Justice for hearing on Wednesday, 29th November.

Until October 1972, some eleven months after the parties were at issue on the pleadings, no step was taken by the plaintiffs to obtain discovery and inspection of documents, or to deliver interrogatories. On 18th October 1972, the plaintiffs then served on the defendant notice to produce under the provisions of O. 32 r. 14. Steps were taken at or about this time to require the defendant to file an affidavit of discovery and to produce documents. On 24th October the plaintiffs delivered interrogatories for the examination of the defendant. The defendant filed an affidavit of discovery in November of 1972. It subsequently delivered further affidavits by way of answer to the interrogatories. In the same month it gave an answer to the notice to produce which had been served under O. 32 r. 14. At an earlier time, on 30th October 1972, it filed its affidavit of discovery, and it has subsequently given inspection of documents under that affidavit and under the notice to produce.

The plaintiffs who appear by Mrs. Inglis, one of their number, seek an adjournment of the hearing of the action until the next sittings of this Court in February on the ground that they are not ready to proceed with the presentation of their case. Two affidavits have been sworn by Mrs. Inglis and filed in support of the application. The affidavits contain some particulars of the difficulties which are said to confront the plaintiffs in presenting their case at this time. In general they show that the plaintiffs' case

has not yet been fully prepared but it is necessary to refer to the matters relied upon with a little more particularity.

The plaintiffs say that they require further and better answers to the interrogatories which have been delivered, a further and better affidavit of discovery, the inspection of relevant documents which the defendant has failed to make available for inspection. In addition, the plaintiffs say that they have not yet had the opportunity of inspecting a considerable number of the many documents which the defendant has made available for inspection, that documentary evidence which they wish to produce from other sources including the Valuer-General of the State of Tasmania and the Registrar of Deeds in that State is not yet available for presentation to the Court. Finally, they say that they have not had time to issue at least three subpoenas which they desire to issue and serve on witnesses whom they propose to call.

I shall deal separately with the application for further and better answers to interrogatories but on the application for an adjournment I should say that except as to the answers to five interrogatories, namely numbers six to ten inclusive of those delivered by the plaintiffs for the examination of the defendant, I do not consider that the defendant's answers are insufficient or that the plaintiff is entitled to any further answers to interrogatories.

As to the notice to produce, it seems to me that it was given in reliance on the provisions of O. 32 r. 14. When the contents of the notice are examined it is evident that the plaintiffs misconceived the nature of the rule because

in its terms it enables a party by notice in writing to give notice to another party in whose writ pleadings, particulars or affidavits reference is made to a document to produce that document for inspection. The notice to produce served by the plaintiffs relates predominantly to documents which have not been mentioned by the defendant in its statement of defence or in affidavits which it filed and for that reason alone the objections which the plaintiffs make to the inspection offered under the notice by the defendant are without foundation, but I should mention the objections which have been taken and the defendant's attitude with respect to them.

The first objection by the plaintiffs was taken to the defendant's failure to produce document No. 1. This document was described as being "each and every banker's book and other books of account". It does not comply with the requirements of r. 14 and the documents are not described with any particularity. Nevertheless the defendant makes it clear that it is willing to produce the original ledger sheets of all accounts of the plaintiffs with the defendant. In my opinion that was a sufficient response to the notice.

Documents Nos. 6 and 7 - here the defendant made it clear that although it was willing to produce the document which was set forth in the pleadings there was no record identifying the name and signature of the witness to that document. In addition the defendant made it clear that its attitude was that the document was not one which had been mentioned in the pleadings or affidavits which it had filed. In my opinion the defendant's response was clearly correct.

Document No. 18 - this document was described as each and every one of the various banker's books and records referred to in par. 40 of the defence. Paragraph 40 of the defence was a traverse in terms of a general allegation contained in the statement of claim which was expressed to relate to the records of the defendant in a general sense. The defendant in its response to the notice states that the reference to records in that general sense in the statement of defence does not fall within r. 14. Again I agree that the defendant's response to the notice is correct.

Document No. 24 - here the defendant responded by saying that there were no such documents. I am unable to go behind the defendant's response.

Documents Nos. 25 and 26 - the defendant says in relation to these that there was no mention of them in the pleadings or affidavits within the meaning of r. 14. Again I agree with what the defendant has said. The defendant however does say that in the document produced under the affidavit of discovery some documents falling within the description of documents Nos. 25 and 26 have been produced. They have been itemised by reference to number.

Documents Nos. 30 and 32 - here again the defendant says that these documents were not mentioned in the defendant's pleadings or affidavits and therefore do not fall within the terms of r. 14. However, the defendant does admit that the copy affidavits in question were not included in its affidavit of discovery, that they were evidently overlooked but that they are now available. The defendant will make a further and better affidavit of discovery and produce the copy affidavits under that affidavit.

Accordingly it follows that the plaintiffs' objections with respect to the defendant's notice in reply to the notice to produce are without foundation.

I come now to the affidavit of discovery and the objections which the plaintiffs have made to that. Of the objections made to this affidavit I think that there is one only which has substance, that is an objection that relates to the claim for privilege contained in par. 3 of the affidavit in which the defendant makes an objection to produce the documents set forth in the second part of the schedule on the ground that the documents referred to in pars. (k), (l) and (m) comprise communications between the defendant and its legal advisers, memoranda regarding such communications, memoranda prepared by various officers and branches of the defendant or passing between such officers and branches made in prospect of litigation.

In my opinion an objection expressed in these terms is inadequate to support a claim for privilege under the head of confidential legal communications passing between solicitor and client, in that the objection fails to state that the communications were confidential, that they were made for the purpose of and relating to advice or litigation, actual or anticipated. For that reason, I think that I should make an order requiring the defendant to file a further and better affidavit of discovery which will deal not merely with this matter but with the copy affidavits filed in the proceedings in the Supreme Court of Tasmania to which I have already referred in dealing with the defendant's response to the notice to inspect documents.

In other respects, I am of opinion that the objections made by the plaintiffs to the affidavit of discovery are without foundation.

I next turn to the matter of inspection of documents. Broadly speaking, the plaintiffs have made a claim for the production of all documents in the possession of the defendant unless the defendant can show that production of particular documents will prejudice the national security or the national interests. It is plain enough that such a view of the defendant's obligation to produce documents on discovery for inspection is misconceived. In my opinion, the plaintiffs have failed to show that there has been a failure on the part of the defendant to make a proper affidavit of discovery and to give inspection of documents except in the two respects which I have already mentioned.

Although it appears from what I have already said that the defendant should be ordered to file a further and better affidavit of discovery, and to give additional answers to interrogatories, I would not regard those matters as warranting an adjournment of the action. In cross-examination of Mrs. Inglis, it was made clear that the plaintiffs have already seen, either now or at an earlier point of time, in circumstances which have not been described, a great many of the documents which the defendant has made available for inspection under the notice and pursuant to its affidavit of discovery. Indeed, it seems that they have in their possession copies of many of these documents. True it is that they desire to check the accuracy of the copies which they have against the documents in the bank's possession,

but it seems that it is unlikely that they will be taken by surprise when they examine the documents which have been produced by the defendant, and which they have not yet inspected under the notice and under the affidavit of discovery.

As to the documentary evidence which the plaintiffs say they will require further time to produce and present to this Court, it is necessary to mention the valuations of various properties which they seek from the Valuer-General, Tasmania. The relevance of this evidence has not yet been established. But I do not think it necessary or appropriate to determine it at this stage.

As to the conveyances which the plaintiffs require from the Registrar of Deeds in Tasmania, it is evident that had they made efforts at an earlier time to have them produced, they would not have been confronted with any difficulty in relation to them now. There is in addition a copy of a High Court judgment in an action Alfred Grant v. Inglis, one of the plaintiffs, which is not presently available despite efforts on the part of the plaintiffs to obtain it. The difficulty here is that there is indeed no assurance that a copy of the judgment is obtainable or will be obtainable in the near future. But with the exception of this document and the evidence to be provided by the Valuer-General it seems there would be little difficulty in procuring this evidence at short notice.

Overall I am inclined to the view that most of the difficulties facing the plaintiffs in the presentation of their case could have been avoided if they had set about their preparation with greater speed. Had that been done,

the documentary evidence, save perhaps the High Court judgment, would have been available; the subpoenas and notices issued and the aspects of discovery, inspection and interrogatories resolved, before this time. However, I must take into account that the plaintiffs appear by Mrs. Inglis and that they do not have the benefit of professional representation. Although Mrs. Inglis holds a university degree, she is not a practising barrister or solicitor.

The case which she proposes to present on behalf of the plaintiffs, as I have said, involves issues which are multifarious and complex, as a glance at the pleadings will show. I think it would constitute a prejudice to the plaintiffs' case if they were forced to present it at this stage of its preparation or, for that matter, in the next four days, as was suggested by counsel for the defendant. In those circumstances, I adjourn the hearing of the action to Tuesday, 13th February 1973, and I make a peremptory order that the action shall come on for hearing on that date.

The defendant has asked that the adjournment should be made conditional upon a number of matters which it has suggested. I decline to condition the adjournment on those matters, but I order that the plaintiffs shall pay to the defendant three-quarters of the defendant's costs of the summons for adjournment, including the costs of and occasioned by the adjournment.

I turn now to the summons for interrogatories, and I say at once that in considering this matter, and, for that matter, the application for an adjournment, I have given attention to the desirability of taking steps apart from

those sought by the parties with a view to facilitating the hearing of the action when it comes on. In the result, I have formulated additional orders which I shall indicate more precisely when I have dealt with the matter of the interrogatories.

The plaintiffs' first objections are to the answers to interrogatories Nos. 6 to 10. Interrogatories Nos. 6 to 10 relate to the valuation made of the plaintiffs' grazing property, Lammamuir by or on behalf of the defendant in 1954 for the purposes of obtaining a loan.

The defendant objected to answering these interrogatories on the grounds that they are irrelevant, not bona fide, unnecessary and not sufficiently material at this stage. However, the defendant concedes that included in its affidavit of discovery and in the documents made available for inspection under that affidavit are documents numbered D2 and D3 which comprise the plaintiffs' application for a loan together with supporting documents including either the valuation or a note of the valuation.

These documents were evidently discovered and produced on the footing that they were relevant to the issues and on the basis that no relevant head of privilege applied to them. In the circumstances, although I have experienced no little difficulty in understanding the plaintiffs' submission that they are relevant to the issues in the action, I am of opinion that the interrogatories should be answered and I shall make an order that the defendant files a further and better answer to interrogatories Nos. 6 to 10.

The next answers in question are those which relate to interrogatories Nos. 14 and 15. These interrogatories relate to the question whether an account at the Moonah branch of the defendant bank is still open or whether it is closed. The defendant in its answer has stated the primary facts in some detail. It has avoided giving a specific answer in the form of "yes" or "no" because of a difficulty in so answering the question by reason of the circumstance that the account was transferred from the Moonah branch to the Hobart branch of the bank. The plaintiffs say that the answer is evasive and not an answer in any event. I do not agree. I think that the defendant's answers to these interrogatories are satisfactory.

The next objection by the plaintiffs relates to interrogatories Nos. 17 to 19. In its answers the defendant has stated the primary facts and has again raised the question whether the account can accurately be described as open or closed in view of the circumstance that a transfer of the account was involved. Once again I think the defendant's answer is satisfactory and I do not propose to order any additional answer to these questions.

The plaintiffs object to the answer to interrogatory No. 20 which consists of two questions. The plaintiffs' objection goes to the first question which is in this form:

> "What was the rate of interest charged on the said account referred to in paragraphs 18 and 19 above?"

The defendant has answered the interrogatory in the terms in which it was framed. It transpires that the plaintiffs' real objection is that the answer is not an answer to the

question "What was the rate of interest charged to the said account?". It is evident that the plaintiffs are the authors of the insufficiency, if it be so, of the answer. The form of the interrogatory did not express the question which they desired to ask. However, counsel for the defendant will formally admit in terms to be stated that no interest was charged to the said account and the plaintiffs will accept that answer as a discharge of the question.

Interrogatories Nos. 46 and 48 to 52 relate to payments to the credit of the accounts, withdrawals from the accounts and certain particulars relating to some of these entries. They require in some instances the statement of totals of payments in or out. In considering these interrogatories I should state that I have independently of them given consideration to directing the defendant to making an admission with respect to the ledger sheets constituting the various accounts of the plaintiffs kept by the defendant.

The defendant's counsel has indicated that it is prepared to accept a direction that it should make a formal admission in relation to the ledger sheets and that it should make a copy of the ledger sheets and make a further admission that those copies constitute copies of the account and all entries by way of credit and debit to the accounts. In addition it should be noted that the defendant has made available on inspection to the plaintiffs the ledger sheets constituting the accounts up to a date in May in 1972 and since that date it has delivered to the plaintiffs a verified copy of the accounts. Under those circumstances I am of

opinion that it would be oppressive to require the defendant to answer the interrogatories in question.

However, I have indicated as well that providing the burden is not too great it would facilitate the hearing of the action if the defendant were prepared to make formal admissions of some of the matters sought in interrogatories Nos. 46 and 48 to 52. Accordingly, I shall direct the defendant to make formal admissions in relation to the matters dealt with in interrogatories Nos. 48 and 49 and the first question asked in each of interrogatories Nos. 51 and 52.

During the course of the hearing the defendant's counsel made the formal admission that the answer to interrogatory No. 50 is "Yes".

I come not to interrogatories Nos. 57 to 59. Here the defendant has answered the interrogatories by stating that it did not know or was not aware of certain matters. The plaintiffs say that the answer is insufficient because the defendant is under a duty to know. I cannot give effect to the objection and I accept the defendant's answer as a sufficient answer.

The plaintiffs then object to the answer to interrogatory No. 60(b). There is some confusion in the answers which have been given by various deponents who have sworn to the answers on behalf of the defendant. The confusion relates to that part of the answer that concerns 19th September 1965 because one deponent states that the relevant date was 19th September 1966. The answer has I think been made clear by counsel from the bar table. He says that the defendant's answer should be 19th September

1966; the reference to 1965 was in error.

The plaintiffs also object to the answer to interrogatory No. 61(c). The interrogatory asks for the text of a record made by a servant of the bank of a telephone conversation which took place on 1st September 1965. The defendant objects to providing the answer on the ground that it is irrelevant, oppressive and unnecessary since the document was made available on discovery. The document was made available on discovery and was itemised as document E89. In those circumstances I do not propose to require the defendant to answer the interrogatory.

Interrogatories Nos. 68 to 70 are again the subject of an objection because the defendant has asserted that it does not know the answer to No. 68, that the only advertisement of which it is aware in answer to No. 69 is 11th June 1966 not 4th June 1966 and that it is not aware of the answer to No. 70. In my opinion no ground has been made out by the plaintiffs for concluding that these answers are insufficient.

Then there is an objection to interrogatory No. 78. This is an objection arising from the form in which the various deponents have sworn to the answers. The difficulty I think has disappeared because counsel for the defendant has made the formal admission that the answer to the interrogatory is "Yes" and he concedes that the answer which he gives will be binding upon the defendant at the hearing.

The final objection relates to interrogatory No. 79. The defendant's answer to that interrogatory relates to the circumstances as they existed at the time

the interrogatory was delivered. The circumstances have changed since that date by reason of the fact that the defendant has delivered to the plaintiffs a verified copy of the accounts since May of 1972. In my opinion that circumstance does not have the result that the defendant's answer is incorrect. I think that the defendant must answer the interrogatory in terms of the circumstances as they prevailed when the interrogatory was delivered to the defendant.

In the result therefore the only order which I propose to make as to the interrogatories is that the defendant does file further and better answers to interrogatories Nos. 6 to 10.

I shall now state specifically the orders which I propose to make on the two applications, and I would ask Mrs Inglis and you, Mr. Bennett, to listen carefully to what I say.

1. I adjourn the hearing of the action until Tuesday, 13th February 1973, and make a peremptory order that the action shall come on for hearing on that day.

2. I order that the defendant shall, within seven days from this date, file and serve a further and better affidavit of discovery.

3. I order that the defendant shall, within seven days from the date hereof file an affidavit answering interrogatories Nos. 6 to 10 inclusive in the interrogatories delivered by the plaintiffs for the examination of the defendant.

4. I direct that the defendant shall, within ten days, with respect to each of the accounts of the plaintiffs kept by the defendant, admit that the account and all entries by way of credit and debit to the account are contained in ledger sheets to be identified by reference to book and page number. I further direct that with respect to each such account, the defendant shall make copies of the ledger sheets comprising such account and admit that the copy ledger sheets comprise the account of the plaintiffs and contain all the entries by way of credit and debit made to that account.

5. I direct that the defendant shall, within ten days, admit the payments and withdrawals referred to in the plaintiffs' interrogatories Nos. 48, 49, 51 and 52 excepting that in the case of the last two mentioned interrogatories it shall not be required to admit the dates on which transactions referred to in those interrogatories took place.

6. I direct that the plaintiffs shall, on or before 15th January 1973, serve on the defendant a list of the documents which the plaintiffs intend to tender in evidence at the hearing, together with copies of the documents, and that the defendant shall, on or before 29th January 1973, notify the plaintiffs as to the documents which it is willing to admit and as to the documents which it declines to admit.

7. I direct that the defendant shall, on or before 15th January 1973, serve on the plaintiffs a list of the documents which the defendant intends to tender in evidence at the hearing, together with copies of the documents, and that the plaintiffs shall, on or before 29th January 1973, notify the defendant as to the documents which they are willing to admit and as to the documents which they decline to admit.

8. I order that the plaintiffs shall pay to the defendant three-quarters of the defendant's costs of the summons for an adjournment of the hearing, including the costs of and occasioned by the adjournment. I order that three-quarters of the costs of the summons for interrogatories shall be the defendant's costs in the cause.

Does any question arise on the orders that I have read out?

MR. BENNETT: There is one question which arises out of your Honour's judgment, and that is that your Honour stated that I have made a formal admission as to interrogatory No. 20. What happened was that I indicated my willingness to make one, but wished to consider it. I am prepared to make that admission now.

HIS HONOUR: I shall, if need be, amend the draft of my judgment to accord with what you are about to say.

MR. BENNETT: In answer to interrogatory No. 20, the defendant admits that no interest was debited to the account referred to in interrogatories 18 and 19 between 14th April 1960 and 26th March 1963. The first interest so debited after 26th March 1963 to that account was debited on 20th June 1963.